

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLO ANTONIO KEVIANNE,

Defendant-Appellant.

UNPUBLISHED

May 8, 2012

No. 301096

Wayne Circuit Court

LC No. 10-004970-FH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon, MCL 750.227. Defendant was sentenced to two years' probation. Defendant appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel because defense counsel disclosed attorney-client privileged information to the jurors regarding defendant's decision whether to testify and defense counsel's advice regarding defendant's decision. We disagree.

"Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, __ Mich App __; __ NW2d __ (2012) (Docket Nos. 296747 and 296848, issued January 10, 2012), slip op at 9. The determination whether a defendant has been deprived the effective assistance of counsel, which is a question of constitutional law, is reviewed by this Court de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel's errors, the result of the proceedings would have differed. *Id.* Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *Id.*

Decisions regarding whether to call and question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). However, a

defendant has a constitutional right to testify in his own defense. *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004). While case law does not explicitly address the propriety of a defense attorney commenting on a defendant's decision whether to testify, cases that address similar comments by a prosecutor are instructive. The Fifth Amendment of the United States Constitution forbids a prosecutor from commenting on the defendant's refusal to testify. See *Griffin v California*, 380 US 609, 614-615; 85 S Ct 1229; 14 L Ed 2d 106 (1965) (The Supreme Court held that the Fifth Amendment forbids "comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."). Statements by a prosecutor designed to suggest that the defendant, in refusing to take the stand, had something to hide constitute a serious infringement on the defendant's constitutional rights. See *People v Mancill*, 393 Mich 132, 133; 223 NW2d 289 (1974) (holding that the prosecution's comments regarding the defendant not taking the stand required a new trial). Comments by a defense counsel, while they do not rise to the level of a constitutional error, may also leave the jury with a similar prejudicial impression.

During the presentation of defendant's witnesses, while the jurors were present, defense counsel stated the following:

Judge, Mr. Kevianne indicated that he wants to take the stand. I've advised him that he does not have to take the stand. In fact, my advice is that he doesn't but he insists he wants to exercise that right and he wanted to take the stand in [sic] his behalf.

The judge then excused the jury for a break. After trial was resumed, defense counsel stated that he was ready to proceed with closing arguments and that defendant had elected not to take the stand. We decline to rule, based upon the record before us, on whether this statement was made in error or as a matter of trial strategy. However, even if defense counsel erred by making a statement regarding his advice to defendant not to take the stand, this error was not outcome determinative.

As provided by MCL 750.227(2),

[a] person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

A showing that a defendant carried a gun in a vehicle operated or occupied by defendant is a prima facie case of violation of MCL 750.227. *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005). Officer Ranson Williams testified that he asked defendant to step out of his vehicle, at which point defendant told him that he had a gun on him but had a license to carry a concealed weapon. Defendant did not have any such license. Furthermore, evidence at trial demonstrated that the firearm defendant possessed was partially or wholly concealed. Consequently, on the basis of the testimony, there was overwhelming evidence of defendant's guilt. This evidence

supports the conclusion that any error on the part of defendant's trial counsel did not impact the result of the proceedings.

Furthermore, we note that the trial court provided the following curative instruction to the jurors:

Every Defendant has the absolute right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way.

It is well-established that jurors are presumed to follow their instructions and that instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has failed to persuade this Court that the error in question was not cured by the applicable instruction. Therefore, defendant has not shown that counsel's performance, even if deficient, impacted the result of his trial.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan